United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

77-1389

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1389

UNITED STATES OF AMERICA,
Appellee,

against

ALFRED FAYER,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of New York

APPELLANT'S REPLY BRIEF

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Preliminary Statement

This brief is submitted in reply to the prosecution's answering brief and in further support of the appellant's arguments for a reversal of the judgment of conviction.

COUNTER STATEMENT OF THE FACTS

The prosecution's description of the first trial (Gov't. Brief 2-18)* is written as if it had been or should have been successful in its first prosecution of Mr. Fayer. It was not nor should it have been. If the prosecution is entitled to all inferences in its favor on an appeal from a conviction, United States v. Glasser, 315 U.S. 60, 80 (1942), then a defendant should be entitled to all inferences in his favor on an appeal involving a prior acquittal.

There were several factors which prompted Judge Weinstein to reach his conclusions. Judge Weinstein's findings are reprinted in full in the Appendix, A 559-589, and are summarized in our opening brief at pages 9-12. In order to place the proceedings at the first trial in their proper context, it is necessary to set forth the precise method by which Judge Weinstein arrived at his acquittal of Mr. Fayer.

Judge Weinstein first considered the bribery indictment (72 Crim. 589). He acquitted Mr. Fayer, stating

> "* * *the Court must find a reasonable doubt based upon the testimony of the defendant himself that he truly believed the Bernsteins' innocence and that he did not under-

*References to the prosecution's answering brief are designated by the prefix "Gov't. Brief".

> stand the nature of the transaction as one to pay Goodwin for not testifying." (A 562-63).

He also found based upon the defendants' demeanor, a reasonable doubt as to his state of mind and intent. (A 563).*

Following his acquittal on the bribery indictment, Judge Weinstein began his discussion of the obstruction of justice indictment.

The prosecution contends that "appellant had not in fact been found not guilty in any real sense on the obstruction of justice charge." (Gov't. Brief 37). Nothing could be more inaccurate. As we shall demonstrate, Judge Weinstein found Mr. Fayer innocent on the broadest of possible grounds, namely that he lacked criminal intent, or phrased differently that Mr. Fayer acted in good faith.

*The prosecution argues that Judge Weinstein initially found that Mr. Fayer aided and abetted the Bernsteins (Gov't. Brief 18, 42-43). But the argument is disingenuous. Judge Weinstein did say that Fayer aided and abetted the Bernsteins. (A 563). But from the context in which it was said, it is clear that he meant that Fayer's good faith conduct on February 9 resulted in the Bernsteins being aided and abetted. The Judge was not referring to 18 U.S.C. §2. Aiding and abetting is a crime which requires criminal intent, United States v. Bryant, 461 F.2d 912, 919-920 (6th Cir. 1972). Judge Weinsteins's findings were directly to the contrary for he stated that Fayer "did not understand the nature of the transaction as one to pay Goodwin for not testifying." (A 563). Although the prosecution contends that there is a conflict between the Judge's earlier statements and his later findings, it is clear that Judge Weinstein did not find aiding and abetting. Indeed, Judge Weinstein found that Mr. Fayer had not participated in an offer of something of value on February 9, 1972. (A 586). And again when pressed by the prosecutor: "He was present, but he did not participate in that offer or in renewal of the offer." (A 587).

As such it was an acquittal in the truest sense of the word, and not as the prosecution seems to contend merely a technical failure to prove one of a number of essential elements of the crime.

There were several factors which were of concern to Judge Weinstein. First, this was a prosecution of a lawyer for advising a third party of the availability of the Fifth Amendment. There was no reported case which had found it to be criminal for a lawyer to advise a prospective prosecution witness that he could invoke the Fifth Amendment. The authority which did exist indicated that a lawyer is permitted to warn a prospective prosecution witness that his testimony might incriminate him even if the lawyer's purpose is to discourage the witness from testifying. McNeal v. Hollowell, 481 F.2d 1145, 1151-52 (5th Cir. 1973) cert. denied 415 U.S. 951 (1974). This Court's opinion in United States v. Cioffi, 493 F.2d 1111 (2d Cir.) cert. denied 419 U.S. 917 (1974) and United States v. Cole, 329 F.2d 437 (9th Cir. 1964) did not involve lawyers, but rather, as Judge Weinstein pointed out, involved as the defendant someone who was involved in the underlying conspiracy.

There was extensive discussion concerning the Code of Professional Responsibility (see, e.g., A 571). Ultimately, it was decided that the matter would be adjourned in order to allow both sides to brief the

question of the meaning of the statutory word "corruptly" in the context of the activities of a lawyer. As the Judge himself said: "It's a difficult question. We want to get a definition that doesn't make a criminal of every lawyer." (A 577-78).

Judge Weinstein did not wait for the briefs, but one week later summoned the parties together, and announced (A 579):

> "* * *I have decided that under no view of the law and the facts can I determine beyond a reasonable doubt that the defendant is guilty.* * *"

Had the research been undertaken, it should have disclosed that in 1962 the American Bar Association's Standing Committee on Professional Ethics rendered two informal opinions finding it proper for a defense counsel to admonish a prosecution witness that the witness' testimony may tend to incriminate him. The first of these opinions (Informal Decision No. C-498) was reported in the May, 1962 ABA Journal (48 A.B.A.J. 474) as follows:

> "Defense counsel in a criminal proceeding may properly warn a witness for the prosecution that his testimony may tend to incriminate him and that he need not testify."

The Ethics Committee reaffirmed its decision in November, 1962 in Informal Decision No. 575 and with special relevance to the facts involved in the first prosecution of Mr. Fayer, answered specific questions put to it.

1. It held that a defense counsel in a criminal proceeding who gives such advice or warning to a prosecution witness, does not thereby establish an attorney-client relationship with the prosecution witness and is not required to withdraw from the representation of the defendant because of such warning to an opposing witness.

2. It is not a violation of the Canon of Ethics to so advise a prosecution witness even if defense counsel's primary motivation in so advising the prosecution witness is to have the witness not testify.

3. It was not necessary for defense counsel to first ascertain if the prosecution witness has requested such advice or whether the witness wishes to consult another lawyer of the witness' own choosing.

In view of the importance which we placed on these ethical opinions, they are reproduced in their entirety in the Addendum to this reply brief.*

Judge Weinstein articulated some of the reasons underlying his acquittal.

*These ethical opinions raised serious questions as to the propriety of the prosecution's extensive cross-examination of Mr. Fayer at the second trial and the implicit thesis underlying the questioning that there was professional impropriety in Mr. Fayer's activities. (Tr. 2.87-2.93). We assume that the prosecution was unaware of these ethical opinions at the time of the first or the second trial.

These ethical opinions are referred to in this brief to provide a correct factual context in which to judge Mr. Fayer's conviction, and to dispel the prosecution's contention that "there were ample grounds in the transcript and testimony for disciplinary action against appellant in the

First, Judge Weinstein had the opportunity to see Mr. Fayer testify and to evaluate his credibility. He expressly found it credible in specific respects. And he also found that the Bernsteins themselves had misled Fayer by stoutly maintaining to him - as well as their prime defense counsel. As he stated (A 579):

> "There is a reasonable doubt necessarily because I must and do credit the defendant's testimony with respect to what the Bernsteins said to him. It is fully consistent with what I heard on the tapes and it's consistent with the way the Bernsteins apparently generally manipulated people."**

Second, he found that Fayer was led on by Goodwin into believing that "Goodwin wanted legal views from Fayer with respect to whether he should continue to rely upon" his present attorney or whether a new lawyer should be retained. (A 579).***

Third, there was no independent evidence to

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*(Cont'd.)
state courts." Although Judge Weinstein had initially also expressed doubts on this subject (A 559), he subsequently admitted that he did not know whether or not there was an ethical violation (A 575) and was making no findings with respect thereto. (A 580). As the ethical opinions demonstrate, there was not.

**The prosecution's statement at p. 43 of its brief that on this occasion the Court "made no finding concerning appellant's belief in the Bernstein's innocence" is blatantly incorrect, as the above quote demonstrates.

***This finding contradicts the prosecutor's factual assertion on appeal in its "statement of facts" that Mr. Fayer "went to the meeting at the restaurant seeking to succeed where the Bernsteins had failed - i.e., to assure that Goodwin would keep quiet* * *" (Gov't. Brief 6-7).

demonstrate any bad faith on the part of Mr. Fayer - and the independent evidence which there was indicated good faith. The lawyer whom Fayer recommended to Goodwin was a responsible member of the Bar whose advice to Goodwin was not subject to manipulation by the Bernsteins (A 580).

Although there are other unwarranted inferences taken by the prosecution in its presentation of the facts, there is one which requires further specific rebuttal. This occurs when the prosecution states:

> "However, appellant did not himself represent the Bernsteins or any of the Eastern Service employees before the grand jury; he was directing the cover-up effort while at the same time trying to keep a low profile* * *." (Emphasis supplied) (Gov't. Brief 5).

Indeed Mr. Fayer did not represent the Bernsteins or Eastern Service; they were represented by former federal judge Simon Rifkind and the law firm of Paul, Weiss, Rifkind, Wharton & Garrison. Rather than there being a "cover-up", the advice given by independent counsel to their respective clients was in keeping with the traditional obligation of a lawyer to protect his clients. So, too, was the advice that Mr. Fayer gave to Goodwin.

Many experienced defense counsels will ordinarily advise against cooperating with the FBI agents or voluntarily appearing before the grand jury. They would ordinarily take such positions only after arrangements are made with the prosectuion. The agents are powerless to

make any binding commitments (while the prosecution is free to do so, cf. Giglio v. United States, 405 U.S. 150 (1972)) and any cooperation with the agents or a voluntary appearance before the grand jury will commit the client to a course of conduct for which there are no firm commitments and from which it is difficult to extract the client in the event the prosecutor's views of the case differ from those of the agents. Mr. Fayer had been told by Goodwin, undoubtedly as part of leading him on, that he (Goodwin) had consulted with his lawyer for only a few minutes. (A 509, 514).

The acquittal entered by Judge Weinstein resulted from a careful analysis of the facts by an experienced trial judge.

POINT I

THE JUDGMENT OF CONVICTION MUST BE REVERSED AS A RESULT OF THE PRIOR ACQUITTAL. THE ISSUE WAS TIMELY RAISED.
(In Reply to Government's Point I, pp. 25-46)

The possibility that an overzealous prosecutor may utilize a perjury prosecution or its statutory counterpart to retry issues already litigated in an acquitted defendant's favor has been of concern to the courts for a substantial period of time. See, e.g., Chitwood v. United States, 178 Fed. 442 (8th Cir. 1910); United States v. Butler, 38 Fed. 498, 499-500 (E.D.Mich. 1889). Perjury statutes were not intended to give prosecutors a second chance to convict the defendant of the substantive crime under the guise of a perjury indictment. It is always theoretically possible to reprosecute an acquitted defendant under the guise of perjury (or its statutory equivalent) on the basis of his testimony at the former trial. If it were permissible to do so, the finality which the Fifth Amendment requires be accorded to acquittals would have little meaning. Defendants could obviously avoid this possibility by not testifying, but this would be contrary to the goals of the criminal justice system, namely, to encourage all persons with knowledge of the facts to testify.

To allow a subsequent perjury conviction to

stand would run counter to at least three of the policy underpinnings which have been held embodied in the Fifth Amendment guarantee against double jeopardy. First, is the fear that successive prosecutions may result in the conviction of an innocent man - a fear, we believe, to be a substantial one in this case where the prior acquittal resulted from an adjudication by an experienced federal judge following a non-jury trial. Second, the danger of prosecutorial harassment of a defendant by subjecting him to repetitive prosecutions - a danger fully justified in this case since Mr. Fayer has been subjected to twelve indictments (nine of which were dismissed by the prosecution itself), an acquittal on two indictments, two trials, one conviction, and two appeals - all arising from the single conversation on February 9, 1972. Third, the legitimate reliance of a defendant upon a prior adjudication, whether or not correctly decided. United States v. Oppenheimer, 242 U.S. 85 (1916).

With respect to a perjury or false declarations prosecution following an acquittal after a trial at which the defendant testified, collateral estopple has two aspects: first, the entire prosecution itself may be barred because it amounts to no more than a relitigation of the prior prosecution; and two, the findings at the prior trial may preclude the reconsideration of certain issues ("issue preclusion") at the subsequent trial.

United States v. Nash, 447 F.2d 1382 (4th Cir. 1971) and Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944) are examples of the former; United States v. Kramer, 289 F.2d 909, 915-918 (2d Cir. 1961) an example of the latter.

The prosecution in its answering brief has dealt only with the question of issue preclusion, and on the basis of an analysis carefully eschewing the mandate of the Supreme Court, that the analysis not be made in a "hypertechnical and archaic" manner, Ashe v. Swenson, 397 U.S. 436, 444 (1970) argues that the identical issues were not adjudicated by Judge Weinstein's acquittal.

We take this opportunity to set forth at greater length than in our opening brief the first and broader rationale why the second prosecution was barred in its entirety by the prior acquittal. With respect to the issue preclusion analysis, we rely in substance upon our opening brief.

Whether the prosecution is barred in its entirety turns on two questions: was the central (or "ultimate") issue at the first trial substantially identical to the central issue at the second trial; and was the evidence at the second trial materially different from, and unavailable to the prosecution, at the first trial? Where, as here, the answer to the first is yes, and to the second no, the entire prosecution is barred.

The central issue at the first trial was simply

what Mr. Fayer meant by certain statements during the February 9 conversation. On the basis of the evidence adduced at that trial, an experienced federal judge acquitted Mr. Fayer.

The central issue at the second trial was identical. Each of the counts of perjury centered about Mr. Fayer's explanation of his meaning of statements he made during the February 9 conversation. This is demonstrated beyond any doubt by the indictment itself which quotes the prior testimony alleged to be perjurious (A 5-10).

Secondly, there is no additional materially different evidence introduced at the second trial which was not available to the prosecution at the first trial. See Note, Perjury by Defendants, 74 Harv.L.Rev. 752, 763 (1961); United States v. Nash, 447 F.2d 1382, 1386-87 (4th Cir. 1971) (concurring opinion). The prosecution attempts to demonstrate that it successfully introduced additional evidence at the second trial (Gov't. Brief 18-19). But this evidence was all available to it at the prior trial. But in all events, it can hardly compare with the additional evidence found insufficient in United States v. Nash, 447 F.2d 1382 (4th Cir. 1971). There, the prosecution at the second trial introduced evidence that it was mechanically impossible for the defendant to obtain the stolen quarters from the dispensing machine for which she claimed to have obtained them. The court there found

the evidence cumulative. The word "cumulative" accurately describes the additional evidence relied upon by the prosecution in t is appeal.

Having once put to a trier of fact the central issue and an acquittal entered, the matter is at an end.

The prosecution has extensively argued that there were no specific findings at the first trial which barred the second prosecution. Thus, for example, it argues that there is a distinction "between a discussion of the fact that the Bernsteins had paid bribes to Goodwin and a discussion of accusations or allegations that the Bernsteins had paid bribes to Goodwin." (Gov't. Brief 30). The short answer to this, and its similar claims (id. at 26-37) is that provided by Judge Friendly in United States v. Kramer, 289 F.2d 909, 916 (2d Cir. 1961):

> "Such a distinction seems utterly captious. More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614, - and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in Abbate v. United States, 1959, 359 U.S. 187, 196, 201, 79 S.Ct. 666, 3 L.Ed.2d 729."

There is no doubt that what was meant by Mr. Fayer at the conversation on February 9 was litigated at the first trial, and decided against the prosecution. It may not slice into successive smaller portions for purposes of subsequent prosecution's conduct which was once judged in its entirety and when so judged resulted in an acquittal.

The prosecution seeks additional support for its second trial of the appellant by urging on appeal that the issue of collateral estopple may have been waived. (Govt. Brief 41-42). It did not assert waiver as a justification for the denial of the motion in the trial court. Indeed, Judge Mishler proceeded to adjudicate the motion on its merits, and as he stated, found that the case authorities did not support the motion. (A 282).

The issue was raised at an appropriate time. Considering the nature of the claim of collateral estopple, a full exposition of the evidence at the second trial would be required in order to give full content to the claim asserted. It, therefore, seems not to be a motion which could conveniently have been decided "without the trial of the general issue," Rule 12(b), F.R.Crim.P. In all events, by proceeding to adjudicate the motion on the merits, Judge Mishler at least implicitly, granted relief from any waiver, as he had power to do under Rule 12(f), F.R.Crim.P.

None of the cases which the prosecution cites as supporting its claim of waiver involve situations where the motion was made in the trial court as part of relief sought under Rule 29 prior to the entry of judgment. They all involved instances where the issue was raised for the first time on appeal. The same is true of this Court's recent decision in United States v. Perez, 2d Cir. Docket No. 77-1076 (November 11, 1977). But significantly there, the Court first adjudicated whether the defendant's post-trial motions amounted to "an effective assertion of his double jeopardy claim" (id. slip opinion 6410). There would have been no need for the court to even address the issue unless a post-trial motion can properly raise the double jeopardy claim.

Moreover, the Supreme Court seems to have applied the "intentional waiver" standard to double jeopardy issues. In Menna v. New York, 423 U.S. 61 (1975), the Court held that a claim of double jeopardy is not waived by a plea of guilty:

> "Where the State is precluded by the United States Constitution from hailing a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."

Although our claim here is properly denominated collateral estopple, it is in the circumstances of this case of equal

magnitude to that involved in Menna v. New York, supra.* The decision in Menna, supra, is consistent with the Court's statement in Schneckloth v. Bustamonte, 412 U.S. 218, 237-38 (1973) that the intentional waiver criteria of Johnson v. Zerbst, 304 U.S. 458 (1938) is applied to "the right to be free from twice being placed in jeopardy."**

Two other circuits have also applied this standard. In United States v. Anderson, 514 F.2d 583, 586 (7th Cir. 1975), the Seventh Circuit permitted a claim of double jeopardy to be raised for the first time on appeal since it did not "find an 'intentional relinquishment' of a 'known right'." In Government of the Virgin Islands v. Smith, 445 F.2d 1089, 1094 (3rd Cir. 1971), the Third Circuit on its own raised and found meritorious a double jeopardy claim although counsel had not raised the issue either at trial or on appeal.

Additionally, the application of the doctrine of

*The prosecution is incorrect when it urges (Gov't. Brief 41-42) that the collateral estopple issue in this case involves only the possible exclusion of certain evidence. As is clear from our opening brief, and again set forth in this Brief (supra, p. 12), the entire prosecution is barred on the basis of Judge Weinstein's finding.

**Although Judge Friendly in United States ex rel DiGiangiemo v. Regan, 528 F.2d 1262, 1268-69, n.5 (2d Cir. 1975) cert. denied sub nom DiGiangiemo v. Olgiatti, 426 U.S. 950 (1976) argued that the Supreme Court's citation to Green v. United States, 355 U.S. 184 (1957) did not fully support the breadth of the principle stated by the Supreme Court, it is significant that the Court's citation to Green was only as an example and could hardly have been intended to refer only to the waiver issue presented in Green. In all events, the Supreme Court's subsequent decision in Menna v. New York, supra, clarified whatever little doubt there may have been.

waiver in the circumstances of this case would not further the basic policy considerations underlying the constitutional protection against double jeopardy. We have outlined three of those policy considerations above; the fear that relitigation may result in the conviction of an innocent man; legitimate reliance upon an adjudication; and the danger of prosecutorial harassment. None of these policy considerations would be further by finding waiver.

The only policy consideration even arguably supportable here is the desire to avoid the effort of all concerned in relitigating a matter once determined. However in this case, that is not totally applicable since a full consideration of the issue involved the evidence introduced at the subsequent trial. The District Judge denied the motion on the merits and there is nothing to indicate that he would have reached a different result had the motion been made at an earlier time. Therefore, the application of the doctrine of waiver to the facts of this case would on balance not substantially further the policies underlying the Fifth Amendment's provision prohibiting double jeopardy.

The issue has not been waived, and considered on the merits Mr. Fayer has been denied the constitutional protection to which he is entitled not "to be twice put in jeopardy." The judgment of conviction entered following the second trial should be reversed.

POINT II

THE TRIAL COURT'S ERRONEOUS ADMISSION OF THE LENGTHY HEARSAY DECLARATIONS OF THE BERNSTEINS AND GOODWIN OUT OF MR. FAYER'S PRESENCE REQUIRES THE CONVICTION BE REVERSED.
(In Reply to Government's Point II, pp. 46-52)

There is no dispute that the testimony offered, and objected to, was hearsay; nor could there be. The prosecution seeks to justify the receipt of the evidence on a number of different grounds. However, none of the grounds asserted justify the admission of the testimony.

First, the prosecution contends that the testimony was admissible as "background" information. Presumably, background testimony is a non-hearsay use. But here the prosecution utilized the testimony substantively against the defendant. Therefore, a case such as United States v. Franks, 494 F.2d 145, 155 (2d Cir.), cert. denied 419 U.S. 828 (1974) is not applicable. Whatever may be the merits of allowing limited hearsay testimony as background, United States v. Cioffi, 493 F.2d 1111 (2d Cir.), cert. denied 419 U.S. 917 (1974), the principle can hardly be stretched to embrace what occurred at this trial. Judged quantitatively, the evidence admitted amounted to 55 pages of trial transcript, an hour-long tape-recorded conversation, and a 72-page transcript of the latter. Almost all of this testimony related to the

bribery arrangements which Judge Weinstein had found Fayer was unaware of at the conclusion of the first trial. (A 562-63; A 579).

Second, the prosecution seeks to justify the admission of this hearsay testimony on the basis that it relates to the intent of the Bernsteins. (Gov't. Brief 47). The intent of the Bernsteins was an absolute irrelevancy at the second trial, where the issue was solely whether Mr. Fayer had testified truthfully at the first trial. Whatever support there was for such an argument at the first trial where the issues were substantially different, there is absolutely no support for the admissibility of this evidence at the second trial.

The prosecution also contends that even if the testimony should not have been received, it was incumbent upon appellant's trial counsel to do more than he did, namely in the prosecution's view he should have moved to strike the testimony and to object to the court's limiting instructions (Gov't. Brief 47). If this argument were valid, it would make the trial more of a game of chess than what it should be, namely, a rational proceeding where lawyers, once having had their say, accept an adverse ruling as binding upon them and their clients unless and until altered by a higher court. There is no obligation, nor should there be, that trial counsel must, at every point in the trial, again reassert points

and arguments which the trial court has previously overruled. Where trial counsel has fully informed the court of appellant's contention and it is clear that further efforts to persuade the court would be unavailing, nothing more is required. Cf. Cohen v. Franchard Corp., 478 F.2d 115, 122 (2d Cir.), cert. denied 414 U.S. 857 (1973).* In all events, if the admission of the testimony was error, the error could not have been cured by the judge either by giving yet another limiting instruction or striking the testimony. It was impracticable to attempt to erase evidence heard by the jury at such length. Cf. United States v. Kramer, 289 F.2d 909, 915 n.3 (2d Cir. 1961).

There was also no indication that the trial court was inclined to do either. The issue of admissibility of this evidence was raised with, or discussed by the trial court, on at least five occasions. (A 46-47; A 62-63; A 66-67, 69; A 71-72; A 110). The court stated a different or an enlarged basis of admissibility as the trial proceeded.** The testimony began as being admitted to show "a history of bribery which related to the February, 1972 conversation" (A 46-47, see also A 62-63), and progressed to include the lawyer-client relationship between Fayer

*The prosecution's citation to United States v. Torres, 519 F.2d 723 (2d Cir.) cert. denied 423 U.S. 1019 (1975) (Gov't. Brief 47) hardly supports a contrary proposition. The footnote relied upon by the prosecution, id. at 727, n.12, simply explained why no objection was made to the limiting instruction.

**Indeed, one of the basis of the court's admissibility has now been abandoned by the prosecution. (Gov't.Brief 52, n.31).

and the Bernsteins and conspiracy. There can be little doubt that the court was aware of the defense counsel's position and that further efforts of persuasion would be unavailing. The testimony was admitted, objected to, and utilized substantively by the prosecutor; it is for this court to determine whether it was properly admitted.

The prosecution also argues that it offered the testimony of these prior conversations on the ground that Mr. Fayer was aware of the substance of the conversations. (Gov't. Brief 48). But Judge Weinstein had found directly to the contrary when, at the conclusion of the first trial, he credited Fayer's testimony with respect to what the Bernsteins had told him and found that they had told Fayer that Goodwin wanted legal views from Fayer with respect to whether he should continue to rely upon this attorney or whether he should get a new attorney. (A 579).

The prosecution seeks to justify the admission of the hour-long February 8th tape-recorded conversation and the 72-page transcript on the additional ground that there were three isolated references, not to the substance of the conversation itself, but to another conversation between Mr. Fayer and Rose Bernstein. The references are quoted in our opening brief at 42-43. The only evidence as to what Mrs. Bernstein had told Fayer was Mr. Fayer's testimony. It had been found credible by Judge Weinstein and is totally consistent with the references made by Fayer

in the February 9 conversation. In spite of this knowledge on the part of the prosecution, it nevertheless argues that the admissibility was proper and it should have been left for the jury to sort out what was passed on, and what was not. (Gov't. Brief 50-51). However, the prosecution did not request the court to instruct the jury on how to determine the issue, nor did the court itself instruct the jury on the matter.*

Through the inadmissible hearsay, the Bernsteins became witnesses against Fayer without ever appearing in court to have their veracity assessed by the trier of fact. The prosecution made no attempt to call the Bernsteins to testify and it bears the burden of producing extra-judicial declarants, or of demonstrating their genuine unavailability whenever the extra-judicial statements being offered at trials are crucial to the prosecution's case. United States v. Oates, 560 F.2d 45, 83 (2d Cir. 1977); United States v. Puco, 476 F.2d 1099, (2d Cir.) cert. denied 414 U.S. 844(1973).

As we pointed out in our opening brief at pages 39-41, the prosecution made substantial substantive use of the hearsay testimony. Judged singly or collectively, the errors in the admission of this testimony cannot be deemed harmless. The conviction which ensued must be reversed and a new trial ordered.

*It was certainly not defense counsel's obligation to submit such an instruction since his position was that the conversation was not admissible.

POINT III

THE CONVICTION ON COUNT FOUR MUST BE REVERSED (In Reply to Government's Points IV and V, pp. 57-66)

One rightly wonders, considering the background of the second prosecution of Mr. Fayer, why count four was included in the indictment and why the District Judge in sentencing Mr. Fayer chose to treat it separate from the other counts. In the context of this case, the addressee of the remark "please stay out of it, please" hardly seems to justify a criminal prosecution.

Judge Weinstein found that Mr. Fayer had no knowledge that the Bernsteins had paid bribes to Goodwin. (A 562-63; 579). The prosecution was bound by that finding. Count four makes sense only if Fayer had such knowledge, since telling Goodwin not to have his lawyer do further investigation could have as a purpose to prevent the uncovering of the Bernsteins' complicity. And having made the basis finding, Judge Weinstein could not have been influenced by Fayer's testimony as to the addressee of the remark, "please stay out of it, please".

It cannot be contradicted that the prosecution attemtped to draft the false declarations indictment to avoid the findings of Judge Weinstein. Yet even so, its statement of the materiality of the alleged false declarations fails to contain a specific identification of the

materiality of count four. (See our opening brief, p. 61).

The only evidence to support the conviction on count four was Goodwin's interpretative testimony that Mr. Fayer's words "Please stay out of it, please" meant to Goodwin that he should tell his lawyer to stop investigating the matter. (A 104-05). Goodwin's interpretation is clearly far beyond the clear meaning of the words.

Count four was by far the weakest count contained in the indictment. As we have argued in our opening brief at pages 59-63, the addressee of the remark was hardly material to any legitimate issues at the first trial, especially when in his testimony at that trial Mr. Fayer acknowledged that he urged Goodwin to have the latter's recently-acquired lawyer stay out of the matter. (A 538-40).

The prosecution argues that the materiality of count four turns upon the distinction between telling someone to drop an attorney and telling someone to tell his attorney to stop investigating the matter. (Gov't. Brief 65). But in the context of this case that is a distinction without a difference. The prosecution concedes that Mr. Fayer told Goodwin to drop his lawyer, and get an experienced defense counsel when subpoenaed. (Gov't. Brief 64). Nowhere did Fayer suggest that Goodwin should retain his present lawyer, but simply have him do no investigating. Were the latter the case, the materiality issue would be different. But where, as here, it is con-

ceded that the lawyer should be discharged, it makes no sense to interpret a statement, "please stay out of it, please" to mean that the lawyer should do no further investigating.

Nor does the context of statement lead on to conclude that that is what is meant. From the transcript and the tape it seems clear that the remark is addressed to someone other than Goodwin, who was present at the dinner. Goodwin himself repeats the remark, not in a questioning fashion, but rather as a repetition of Fayer's imperative statement addressed to someone else at the dinner. Literally, the remark makes the most sense as addressed to someone present at the dinner exhorting immediate action. The transcript itself has no question mark after Goodwin's statement. (A 405).

In sum, there was simply no reason for Mr. Fayer to answer other than truthfully, that the statement according to his recollection was made to Mrs. Bernstein.

When so judged, it is doubtful at best whether the evidence was subject to allow "'a reasonable mind [to] fairly conclude guilt beyond a reasonable doubt.'" United States v. Freeman, 498 F.2d 569 (2d Cir. 1974). If the evidence was sufficient, it was marginally so at best.

It is in this context that the prosecution's conduct in summation with respect to count four, Goodwin's

interpretative testimony and the materiality of count four must be judged. When so judged, the conviction on count four must be reversed.

CONCLUSION

For the foregoing reasons, as well as those contained in our opening brief, the judgment of conviction should be reversed.

Respectfully submitted,

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ADDENDUM

American Bar Center

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON PROFESSIONAL ETHICS

Re: Informal Decision No. 575 11/1/62
Defense Attorney Warning Prosecution Witness

You refer to this Committee's opinion C-498 which relates to the subject of advising an opposing witness of his legal rights.

You refer to the statement on page 474 of May 1962, A.B.A. Journal, as it relates to such opinion, that "Defense ~~council~~ Counsel in a criminal proceeding may properly warn a witness for the prosecution that his testimony may tend to incriminate him and that he need not testify." I enclose a copy of opinion C-498 in order that you may be cognizant of our Committee's reasoning in reaching its conclusion.

You propound certain questions which our Committee deems to be within the purview of opinion C-498, covered by its reasoning. Those questions and the Committee's answers are as follows:

(1) Does the defense attorney in a criminal proceeding who undertakes to warn a witness for the prosecution that his testimony may tend to incriminate him and that he need not testify, in fact or in law, thereby put himself in the position of giving advice to such witness concerning his legal rights so as to establish any type of attorney-client relationship between the defense attorney and the prosecution witness?

The Committee's answer is "No." The balance of your query (1), relating to the advisability of withdrawal of the defense attorney because of having given such warning to an opposing witness, our Committee also answers in the negative.

(2) If the defense attorney's primary motivation in so advising the prosecution witness is the desire to encourage or to persuade the prosecution witness to not testify against the accused, isn't this a violation of at least the spirit of Canons 15, 22 and 39 of the Illinois State and American Bar Associations' Canons of Professional Ethics? If not, is it violative of the letter or spirit of any of the Canons of Professional Ethics?

Our Committee's answer is, "No," as to both of the questions propounded under (2).

(3) If the defense attorney's secondary motivation in so advising the prosecution witness be to encourage or to persuade the prosecution witness to not testify against the accused, but his primary motivation be that, as an officer of the court, of insuring or attempting to insure that the prosecution witness' basic rights are afforded him, or at least

that he understands what those basic rights are, then shouldn't such warning:

(a) If made after commencement of the trial, whether done in or out out of open court, be either primarily or exclusively within the province of the trial judge

The Committee's answer to (3) (a) is, "No."

(b) or if made before commencement of the trial, be either primarily or exclusively within the province of the prosecuting attorney as part of his responsibilities delineated in Canon 5 of the Canons of Professional Ethics of the Illinois State and American Bar Associations? If not, would not the defense attorney before volunteering such advice be ethically required to ascertain if the prosecution witness has requested that such advice be given, or to ascertain if the prosecution witness desires to consult another attorney of his own choosing from whom to obtain such advice?

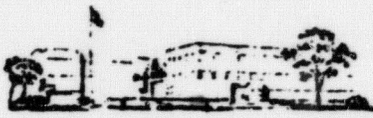
Our Committee's answer to both questions propounded under (3)(b) is, "No." Concerning the subject matter of the second question, our Committee is of the further opinion that the procedure suggested, while appropriate, would not be necessary.

(4) Under what circumstances may the defense attorney suggest to a prosecution witness that the witness consult another attorney for advice concerning the witness right not to testify or not to incriminate himself?

The Committee feels that this question is answered by its opinion C-498 as well as herein.

(5) Does Informal Opinion 498 mean that the defense attorney may, in situations where proper to do so, warn a prosecution witness that he need not testify at all in the criminal action, or does it mean that the witness may properly be warned only that he need not testify as to those matters which may tend to incriminate him? The former would not seem to be the law.

Opinion C-498 is to the effect only, that in situations where proper to do so, the defense lawyer may warn a witness for the prosecution that his testimony sought to be elicited may tend to incriminate him.



American Bar Center

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON PROFESSIONAL ETHICS

Re: Informal Decision No. C-498 3/23/62
Advising Opposing Witness of Legal Rights

You propound the following question: Would a civilian defense counsel in a United States Army General Court Martial proceeding, in defending his client against a criminal charge, be authorized to advise witness for the prosecution, who was either a part or a collateral actor in the alleged criminal offense, that if he desired, he could refuse to testify against defense counsel's client on the ground that the testimony of the witness may tend to incriminate him.

The question falls within the purview of Canons 5 and 15.

> Canon 5. "It is the duty of the lawyer to undertake the defense of a person accused of a crime, regardless of his personal opinion as to the guilt of the accused * * *. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person be deprived of life or liberty, but by due process of law. * * * ."
>
> Canon 15. "The lawyer owes 'entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. * * * ."

Canon 15 also admonishes against the "false claim, * * *, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."

Article 21 of the 1951 Uniform Code of Military Justice is similar to the Fifth Amendment of the United States Constitution which extends to a citizen the privilege of electing to refuse to testify on the ground that the answer may tend to incriminate him.

Defense counsel should present by fair and honorable means every defense the "law of the land" permits to the end that no person be deprived of life or liberty except by due process in order that the client be afforded the benefit of every remedy and defense authorized by the law of the land. Canons 5 and 15.

Nowhere is such admonition nullified by any requirement that the defense lawyer must refrain from advising a witness for the prosecution that the answers sought may incriminate him; nor does the law of the land forbid such an admonition addressed to the prosecuting witness by defense counsel. Therefore, such an admonition by defense counsel to the prosecuting witness cannot constitute a basis of "any manner of fraud or chicane." Canon 15.

We, therefore, hold that defense counsel would be acting within the permitted sphere of ethics in the conduct of a criminal proceeding should he see fit to admonish a witness for the prosecution that his testimony sought to be elicited may tend to incriminate him.

Due and timely service of Two copies
of the within Brief is hereby
admitted this 12TH day of DECEMBER 1977

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Attorney for APPELLEE

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